U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 July 2003

Case No.: 2002-STA-50

In the Matter of:

CLIFFORD E. HILLIS,
Complainant

v.

KNOCHEL BROTHERS, INC.,
Respondent

APPEARANCES:

Mia M. Wesbrooks, Esquire,
For the Complainant

Gregory A. Robinson, Esquire,
For the Respondent

BEFORE: ROBERT J. LESNICK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises under the whistle blower provisions of the Surface Transportation Assistance Act ("STAA" or "the Act"), 49 U.S.C. § 31101 *et seq.*, and the regulations promulgated thereunder in 29 C.F.R. Part 1978 ("the Regulations"). The Complainant alleges that he was improperly discharged in reprisal for refusing to operate a commercial vehicle in violation of safety regulations. Specifically, the Complainant alleges that he was discharged for refusing to drive the Respondent's truck without a proper mud flap. The claim for discriminatory termination falls under Section 31105 of the Act.

The findings of fact and conclusions of law set forth in this decision are based upon my analysis of all of the admissible evidence in the record. Each exhibit and argument of the parties, although perhaps not specifically mentioned, has been carefully reviewed and thoughtfully considered. References to CX, RX, and ALJX pertain to the exhibits of the Complainant, Respondent, and this Court, respectively. The transcript of the hearing is cited as TR, followed

by a page number.

PROCEDURAL HISTORY

A claim was filed by the Complainant against the Respondent on September 3, 2002. The Complainant alleged that he was fired because he refused to follow the direction of his supervisor to install a mud flap, which the Complainant believed was in violation of the legal requirements. The Secretary's Findings were issued by letter dated September 4, 2002. (ALJX 4). Included in those findings was a determination that the claim was untimely because it was filed outside the 180-day statutory limit for STAA claims. By letter to the Chief Administrative Law Judge, dated September 16, 2002, Andi Hillis, the Complainant's wife, asked for a review of those findings, and likewise asked that the statutory limitation be tolled in her husband's case. (ALJX 5).

The case was assigned to the undersigned, and a Notice of Hearing was issued on February 11, 2003. The Complainant and Respondent filed their respective Pre-Hearing Statements on February 24, 2003. (ALJX 1, 2, respectively). A hearing was held in this matter on February 26, 2003, in Phoenix, Arizona. At the hearing, the Complainant offered ten exhibits into evidence, which were marked as CX 1 – 7, and 8 – 11. The Respondent offered four exhibits into evidence, identified as RX 1 – 4. Five exhibits were also added as exhibits of the Court, marked ALJX 1 – 5. On April 21, 2003, the Respondent filed its post-hearing brief, and the Complainant's post-hearing brief was filed on April 22, 2003. The Respondent filed its Reply Brief on May 5, 2003.

FACTUAL BACKGROUND

Knochel Brothers, Inc., ("Respondent" or "the company") is a commercial construction company. (TR 228). Presently, Herbert V. Knochel, Jr., ("Mr. Knochel") owns 50% of the company's shares, and also serves as the company's Vice President. (TR 228-230). Mr. Knochel's brother, Nathan, owns the remaining 50% of the shares. (TR 230). The company was started by Mr. Knochel's father (TR 235); Mr. Knochel started working for the company in 1981. (TR 236). Today, the company has more than fifty pieces of large equipment, including trucks, loaders, and water towers. (TR 236). Mr. Knochel estimates that the company has approximately one hundred employees, and a net worth of several million dollars. (TR 229-230).

Clifford Hillis ("Complainant") began working for Knochel Brothers in 1998, as a heavy equipment hauler. (TR 18-19). He was employed with the Respondent for approximately three and one-half years. (TR 18). His educational background includes high school and some trade school, with special training in mechanics. (*Id.*) Mr. Hillis served in the armed forces, including three years as a prisoner of war. (*Id.*) He had eighteen years of experience as an equipment hauler. (*Id.*) On October 3, 2001, the Complainant's employment with Knochel Brothers was terminated. Mr. Hillis currently works for Rommel Construction, as an equipment operator. (TR 17).

STIPULATIONS OF FACT

Counsel for the Complainant offered three stipulations in this case, each of which was agreed to by the Respondent's counsel, and accepted by this Court. First, the parties stipulated that Knochel Brothers, Inc., was operating commercial vehicles in the regular course of business. (TR 5-6). Secondly, the Complainant was employed at the relevant times, to operate a commercial motor vehicle, which is defined as a vehicle with a gross weight over 10,000 pounds. (TR 6). Finally, the parties agreed that the commercial motor vehicle was driven in interstate commerce affecting the public welfare. (*Id.*)

TESTIMONIAL EVIDENCE

Clifford Hillis

Clifford Hillis is currently employed as a heavy equipment operator for Rommel Construction. (TR 17, 43). He had previously worked for Knochel Brothers as a heavy equipment transport driver for approximately three and one-half years. (TR 18, 43). Mr. Hillis testified that he was called to work on October 3, 2001, to haul some equipment. (TR 20). According to Mr. Hillis, he had ordered a mud flap, and asked the "parts person" if it had arrived. (*Id.*) Mr. Hillis testified that, according to his understanding of the law, it was illegal to operate the commercial truck without a mud flap, or without the proper sized mud flap. (*Id.*) Mr. Hillis stated that he did not care about the color, design or manufacturer of the mud flap, just that it was legal. (TR 20-21, 64).

Mr. Hillis said he told his supervisor, Mr. Purdom, about the missing mud flap; Mr. Purdom offered him two alternative mud flaps, but he considered both unacceptable and rejected them. (TR 21-22). Mr Hillis rejected the first one because it was approximately ten inches too short. (TR 22) He likewise rejected the second mud flap because he would have had to alter it in such a way, that it would have been too thin, and potentially fallen off the vehicle. (TR 22-23, 55-56). Mr. Hillis explained, in detail, that he would have had to cut the black mud flap in such a way that would have required placing a bolt through the center of the flap, which was "nonreinforced, very thin, probably a sixteenth inch or less." (TR 99).

Mr. Hillis said that he refused to install the two offered mud flaps because he was concerned about public safety, as well as receiving a traffic citation. (TR 21, 28). Mr. Hillis believed both of the options offered were illegal. (TR 38). On redirect examination, Mr. Hillis again stated that he had a reasonable apprehension that both mud flaps were unsafe and illegal. (TR 94). He further noted that he believed he was acting in good faith and taking the correct action by refusing to operate the vehicle with either mud flap offered to him. (*Id.*)

According to his testimony, Mr. Hillis could have gone to a Mack Truck store, a NAPA store, or his own garage to procure a mud flap, and he volunteered to do so. (TR 24, 40-41).

Mr. Hillis said the offer was rebuffed by Mr. Purdom, who insisted that Mr. Hillis put on one of the mud flaps given to him, or he was fired. (TR 24). Mr. Hillis further said that he told Mr. Purdom that those mud flaps were illegal, and he refused to install them. (TR 24-25). Mr. Hillis testified that he was fired, which he believed was a direct result of his refusal to install an "illegal" mud flap. (TR 25). Mr. Hillis noted that Mr. Purdom came out of the office shortly after this incident and stated that it did not have to end in this fashion, which Mr. Hillis interpreted as meaning he could keep his job if he installed one of the mud flaps offered by Mr. Purdom. (TR 34). Mr. Hillis again refused those mud flaps, and he left with the belief that he was fired. (TR 34-35).

Shortly after his termination, Mr. Hillis applied for unemployment compensation.[1] (TR 41). Mr. Hillis testified that he filed a statement concerning his termination in order to be eligible to receive benefits. (*Id.*) In that statement, he indicated that he was fired for refusing to install the mud flaps, and that he offered to buy proper mud flaps. (TR 42, 68; CX 1). According to Mr. Hillis, these statements were not refuted, and he ultimately received unemployment compensation. (TR 42, 68-71).

Mr. Hillis stated that he was out of work over six months after his termination. (TR 26). He depleted his savings and three individual retirement accounts ("IRAs"), and fell behind on his bills and his mortgage. (TR 26-26). Ultimately, Mr. Hillis declared bankruptcy under Chapter 13 of the bankruptcy code. (TR 27). As noted above, Mr. Hillis is currently working, although at a lower salary, with virtually no overtime. (TR 27-28).

On cross-examination, Mr. Hillis noted that the company's truck had either a damaged mud flap or missing mud flap for approximately two or three weeks. (TR 47, 57). Mr. Hillis testified that he ordered a replacement three weeks earlier because of that mud flap's condition. (TR 122).

Mr. Hillis also discussed two prior incidents while driving the Respondent's trucks. On one occasion, Mr. Hillis was driving a truck carrying a piece of equipment; he misjudged the size of the load and hit an overpass. (TR 59-61). In a second incident, Mr. Hillis failed to lower the ramps before moving a water truck off of the "low boy" trailer. (TR 61). The water truck thus fell 30 inches, which "bent the drive". (*Id.*) However, or redirect examination, Mr. Hillis stated

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[1] Mr. Hillis testified that he applied for unemployment benefits the day after he was fired. (TR 41). The Claimant also submitted into evidence his Wage Statement, an Arizona Department of Economic Security form for his unemployment insurance claim, which is dated October 5, 2001. (CX 1). Mr. Hillis further testified that he received benefits after filing a statement regarding his termination. (TR 41). That statement was handwritten on another Arizona Department of Economic Security form requesting detailed information about the employment separation. (CX 1). In the handwritten note, Mr. Hillis explained that he was fired "because I refused to install an illegal mud flap on my truck. When I said I would go to Mack and get the proper mud flap I was told I was fired." (*Id.*)

that he never had any indication that the Respondents were not satisfied with his work, despite these incidents. (TR 87-88).

Believing he was wrongfully terminated, Mr. Hillis eventually sent a letter to U.S. Senator John McCain, seeking assistance. (TR 81). Senator McCain responded by letter, dated September 16, 2002, indicating that he was forwarding Mr. Hillis' letter to the Director of OSHA. (*Id.*, CX 9).

On recross-examination, Mr. Hillis read part of the Arizona statute regarding mud flaps. (TR 117-118). He acknowledged that under the statute, a mud flap was not required on his tractor if used in combination with another vehicle, such as the low boy trailer. (TR 118-119). Mr. Hillis further noted that while he did not know if he was going to be dropping his trailer at some point, he was going to use a low boy trailer on the delivery for which he was preparing when the mud flap dispute occurred. (TR 118).

Andi Hillis

Andi Hillis and the Complainant have been married for approximately six years. (TR 140). Mrs. Hillis assisted her husband in completing the paperwork for unemployment compensation. (*Id.*) Mrs. Hillis also reported, by telephone, her husband's termination to Arizona's OSHA, first on October 5, 2001, and again on October 26, 2001. (TR 140-141). According to Mrs. Hillis, the agency responded to her complaints by stating that these matters were not in their jurisdiction. (TR 141). In addition to Arizona's OSHA, she stated that on October 5, 2001, she also contacted "the Arizona Labor Department, Department of Labor, the Arizona Department of Transportation, all local agencies." (TR 142). She continued, "I wasn't aware of the federal agencies at the time. I didn't know there was a difference." (*Id.*) Mrs. Hillis testified that each agency stated that the complaints were not in its respective jurisdiction. (*Id.*) Mrs. Hillis further testified that she contacted EEOC, which provided her with a list of 48 labor attorneys. (TR 146). She contacted those attorneys; one attorney suggested she contact the U.S. Department of Labor, OSHA, and Senator McCain, all of which she did. (TR 147). She spoke to the attorney's wife in July or August 2002, then drafted a letter describing the situation; the attorney returned her call in September 2002, on Labor Day. (TR 147-148).

Ultimately, after "months going on Web sites and researching different things and pulling up regulations and talking to different people," Mrs. Hillis stated that she spoke to an investigative administrator from the OSHA office in Hawaii, who explained the 180-day requirement. (TR 150). She advised Mrs. Hillis on what was required to request tolling. (*Id.*) This communication occurred in September 2002. (TR 171). Mrs. Hillis also testified about her husband's September 3, 2002 filing with OSHA, and the September 4, 2002 decision denying the claim as untimely. (TR 171-174).

Mrs. Hillis testified at length regarding the couple's damages and debts that she attributes to her husband's termination. (TR 157-169). In that testimony, she discussed the difference in

the Complainant's wages, including less overtime, their savings account, money withdrawn from IRAs, and the impact of their situation on their credit rating and overall financial stability. (*Id.*)

Herbert V. Knochel, Jr.

Herbert Knochel is the Vice President of Knochel Brothers, Inc. (TR 228). He and his brother, Nathan, each own fifty percent of the company's shares. (*Id.*) Knochel Brothers is a commercial construction business, with approximately 100 employees, fifty to seventy pieces of equipment, and an estimated net worth between two and five million dollars. (TR 228-230, 236).

Mr. Knochel testified that he was not present during the incident between Mr. Hillis and Mr. Purdom on October 3, 2001. (TR 231). He further noted that he is usually at that facility about 25% of the time, during which he will check in on the shop and the offices, and observe how the people are doing and how business is flowing. (TR 231-232). In response to a hypothetical, Mr. Knochel stated that if a vehicle needed a mud flap, he would want someone to replace the missing part. (TR 232). If an employee desired to purchase a mud flap, he would have to ask permission from Mr. Knochel, or in his absence, Mr. Purdom, or place an order through Mr. Holverson. (TR 233-234).

According to Mr. Knochel, he was bothered by the Complainant's firing, however, when asked if he would consider reinstatement, he replied, "That might be difficult." (TR 234-235). He learned of the firing and the reason for the action on October 3, 2001, as Mr. Hillis was leaving. (TR 234).

Mr. Knochel stated that his company keeps 24-inch, 30-inch, and 36-inch mud flaps in inventory, all of which are capable of being cut across the bottom to be the proper size. (TR 238). If necessary, additional holes can be cored out with a punch, creating "a little hole the perfect size," preserving the stability of the flap. (TR 238-239).

During his testimony, Mr. Knochel discussed the decision to acquire a second hauling truck. He stated that they were contracting out a substantial amount of work, and paying an average of twenty hours of overtime per week to Mr. Hillis. (TR 244). Mr. Knochel concluded that the funds used for these expenditures would pay for most of a second driver's salary. (*Id.*) Mr. Knochel also noted that they frequently would want to pick up or deliver two loads at once; a second truck would allow them to accomplish this more efficiently than having one truck make multiple trips. (*Id.*) Mr. Knochel noted he heard rumors that the Complainant was unhappy about the decision to add a truck because he would lose some of his overtime hours. (TR 245). Mr. Knochel asked the Complainant about his concerns, and Mr. Hillis allegedly threatened to quit if he lost hours. (TR 246). Mr. Knochel said that he told the Complainant to make the necessary adjustments to his budget because the second truck was going into service. (TR 247).

Mr. Knochel testified that he noticed Mr. Hillis was a slow worker and that he frequently talked to other workers. (TR 247-248). Mr. Knochel also stated that he investigated the Complainant's accident when he drove under a low overpass, causing damage to a piece of equipment, and costing approximately $59,000 in repair and replacement costs. (TR 250). According to Mr. Knochel, he determined that the accident was due to the Complainant's negligence; however, he did not fire the Complainant. (TR 250-251). Mr. Knochel also investigated the incident involving the damage to the water truck after Mr. Hillis offloaded it from the low boy without the ramps, although his investigation occurred "some while after." (TR 251). Again, no disciplinary action was taken after that incident. (*Id.*)

On redirect examination, Mr. Knochel acknowledged that both plastic and rubber mud flaps have advantages and disadvantages. (TR 258). He further noted that mud flaps do not always fit perfectly, and modifications may be needed. (TR 261). Mr. Knochel opined that "a makeshift mud flap would be just as good" as an unmodified mud flap. (*Id.*)

James Purdom

James "Bo" Purdom is employed as the Maintenance Supervisor/Transportation Coordinator/Shop Manager for Knochel Brothers. (TR 175-176). He has worked for the Respondent for approximately eight or nine years, and approximately three years in his present capacity. (TR 176). He received a certificate for completing the Arizona Safety Inspection Program, which is defined as "a joint effort between Law Enforcement and the Arizona Rock Products Association to promote safer commercial vehicle operation by self inspection of commercial vehicles by industry." (TR 176-177; CX 11). Mr. Purdom noted that his duties included annual vehicle inspections and remedying problems, when necessary to comply with the law. (TR 179-180). He further noted that Mr. Knochel had given him the authority to fire employees. (TR 179).

Mr. Purdom acknowledged that Mr. Hillis had driven the Respondent's vehicle for a period of time without a mud flap, however, he was unable to say for how long. (TR 180-181). On October 3, 2001, Mr. Purdom presented the Complainant with two mud flaps, both of which were rejected. (TR 184). Mr. Purdom insisted; however, Mr. Hillis made it clear that he did not approve of the two choices presented. (TR 187). According to Mr. Purdom, the Complainant wanted a white mud flap to match the truck's other "Mack" mud flaps. (*Id.*) Mr. Purdom testified that he did not ask Mr. Holverson if he ordered the mud flap for the Complainant, nor did he permit the Complainant or anyone else to go to any store to purchase one. (TR 190-191). Mr. Purdom stated that they had mud flaps in stock and with regards to the second mud flap he offered the Complainant, Mr. Purdom advised him to cut it to fit and attach it to the truck. (TR 192).

According to Mr. Purdom, the black mud flap (RX 2) could have been cut and bolted on to the truck using brackets with clips, which provide added strength and support. (TR 200). However, he admitted that it is safer if the rubber mud flap is installed with the bolts through the

thicker, reinforced part of the mud flap. (TR 271). Generally, Mr. Purdom believes the rubber mud flaps to be more durable because the more rigid, plastic mud flaps become brittle and curl in the Arizona heat. (TR 201). Moreover, he added that the "Mack" mud flap is approximately four to six times as expensive as the black rubber mud flap. (*Id.*) Mr. Purdom estimated that it would have taken around 15 minutes to have made the necessary adjustments to fit and attach the black mud flap to the truck, while it would have taken "between an hour and an hour and a half" to buy and install the "Mack" mud flap. (TR 202). Mr. Purdom testified that the Complainant only suggested going to the "Mack" store; he made no mention of going to Car Quest, NAPA, or his home. (*Id.*)

Mr. Purdom noted on cross-examination that he understood the law regarding mud flaps to mean a mud flap was not required on the tractor, if it was coupled with a trailer. (TR 196). Mr. Purdom stated that a mud flap is required only when moving a water tower; every other load requires an attached trailer. (TR 208). On October 3, 2001, the Complainant's first load involved hauling a blade, and the second job was to haul a paver, both of which required the use of the low boy trailer. (*Id.*) However, the witness admitted that there were times when the Complainant used a trailer, and times when he needed to drop the trailer. (TR 217).

According to Mr. Purdom's understanding of the federal law, no-sail mud flaps are not required; thus, a generic black rubber flap is legal, as long as it is the proper length and width. (TR 197). The witness testified, however, that he tried to make special efforts to keep the Complainant happy after the second truck was added, such as purchasing items like aluminum wheels, a sun visor and new seats for the Complainant's truck. (*Id.*)

After the Complainant and Mr. Purdom disagreed with each other over the quality of the mud flaps, the discussion turned to argument. Mr. Purdom told Mr. Hillis to clean out his truck, punch out and leave the property. (TR 203). According to Mr. Purdom, he then went out to the truck and attempted to calm Mr. Hillis down, but Mr. Hillis, upset over his firing, rejected the attempted reconciliation. (TR 204). During the hearing, Mr. Purdom testified that prior conduct affected his decision. He discussed Mr. Hillis's two accidents, his belief that Mr. Hillis took too long for his trips, and the Complainant's reputation for excessive talking. (TR 205).

Arthur Holverson

Mr. Holverson has worked for Knochel Brothers for 18 years. (TR 266). His job duties include purchasing parts and shop supplies. (*Id.*) Mr. Holverson stated that he has difficulty hearing, however, he was able to hear Mr. Purdom and Mr. Hillis talking, approximately ten feet away, on October 3, 2001. (TR 268-269). According to Mr. Holverson, Mr. Hillis did not want to put a black mud flap onto his truck, but the witness did not hear any mention of public safety or legality. (TR 271). Mr. Holverson testified that Mr. Purdom did not ask Mr. Hillis to drive the truck in an improper method; according to Mr. Holverson, Mr. Purdom was going to put the mud flap on the truck, but Mr. Hillis rejected those flaps in stock. (TR 274). Mr. Holverson noted that he now believes Mr. Purdom was justified in firing Mr. Hillis, because Complainant was not

going to do what his supervisor asked of him. (TR 276). Mr. Holverson also testified that the Mack mud flaps cost approximately $16 or $17, and the generic black mud flaps generally cost about $6 or $7. (TR 270, 278). Moreover, the company could have had the black mud flaps delivered in approximately 20 minutes from the local store, if the company did not have the proper sizes. (TR 267).

ISSUES

I. Whether the claim was filed timely; if not filed timely, whether the principles of equitable tolling apply?

II. Whether the Respondent, Knochel Brothers, Inc., violated the employee protection provision of the Act by terminating the employment of the Complainant, Clifford Hillis?

APPLICABLE LAW

Under the Act, a person "may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because the employee ... has filed a complaint ... related to a violation of a commercial motor vehicle safety regulation, standard or order."[2] Likewise, an employee cannot be discriminated against or disciplined for refusing to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health, or the employee has a reasonable apprehension of serious injury" to either himself or the public because the vehicle is unsafe.[3] An employee who alleges a violation of subsection (a) may file a complaint with the Secretary of Labor within 180 days after the alleged violation occurred.[4]

ELEMENTS AND BURDEN OF PROOF

In order to make a *prima facie* case under the STAA, the complainant must prove that: (1) he engaged in protected activity under the Act; (2) he was subjected to adverse action; (3) respondent was aware of the protected activity when it took the adverse action; and (4) that there was a causal nexus between his protected activity and the employer's adverse action.[5]

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[2] 49 U.S.C. § 31105(a)(1)(A).

[3] 49 U.S.C. § 31105(a)(1)(B).

[4] 49 U.S.C. § 31105(b).

[5] *See, e.g., Frechin v. Yellow Freight Systems, Inc.*, 1996-STA-34 (ALJ Sept. 12, 1997) (*aff'd* ARB Jan. 13, 1998). *See also Forrest v. Transwood Logistics, Inc.*, 2001-STA-43 (ALJ Aug. 7, 2001) (*aff'd* ARB Jan. 25, 2002) (citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)).

If the complainant has established a *prima facie* case, the burden of production shifts to the respondent to demonstrate a legitimate, nondiscriminatory reason for its employment action.[6] If the respondent successfully rebuts the complainant's *prima facie* case, the complainant must prove, by a preponderance of the evidence, that the reasons proffered by the respondent were not the true reasons, but rather, a pretext for discrimination.[7] At all times, the complainant bears the ultimate burden of establishing that he was subject to intentional discrimination.[8]

DISCUSSION

Timeliness

The Respondent argues that this claim was untimely because it was filed beyond the 180-day statutory period. (*See, e.g.*, TR 7-9). In his opening statement, Respondent's counsel stated that "as a statutory court, if there's not statutory compliance with the rules to get here, then there's no jurisdiction for this court, and the only ruling can be that the complaint was filed out of time and this court can make no determination on the merits." (TR 8). The Respondent further relies on the determination by OSHA's Deputy Regional Administrator, that the claim was not timely filed. (ALJX 4). Accordingly, OSHA dismissed the complaint. (*Id.*)

The Complainant challenges the notion that the claim was not timely filed. During her opening statement, counsel for the Complainant identified the activities undertaken by Mr. Hillis and his wife after his termination. Counsel noted that Mrs. Hillis telephoned several state agencies, including Arizona OSHA, within the statutory time period. (TR 14). Similarly, Mrs. Hillis testified that she reported her husband's termination by telephoning Arizona's OSHA on October 5, 2001, and October 26, 2001. (TR 140-141). In addition, she stated that on October 5, 2001, she also contacted "the Arizona Labor Department, Department of Labor, the Arizona Department of Transportation, all local agencies." (TR 142). She was advised to contact the federal OSHA around Labor Day 2002, and on September 3, 2002, the present claim was filed.

Complainant's counsel opined that the Regulations permit the filing of a complaint of discrimination with any OSHA officer or employee. (TR 14-15). In addition, she referred to the Federal Motor Carrier Safety Administration Web site. Based upon this information, Counsel argued that a claim may be filed within 180 days after the discharge. (TR 15-16)(Emphasis added). According to counsel, the Web site noted that a claim may still be filed after the 180-day period, however, it may be denied by OSHA as untimely. (TR 16).

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[6] *See, e.g., Moon v. Transport Drivers, Inc.*, 836 F.3d 226, 229 (6th Cir. 1987).

[7] *Id.*; *see also Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

[8] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-508 (1993)(citing *Burdine*, 450 U.S. at 253, 256).

A similar argument was offered to support a timely filing in *School District of Allentown v. Marshall*.[9] In that case, a school teacher filed a complaint under the Toxic Substances Control Act with the Secretary of Labor, alleging retaliation from the Allentown School District for his activities designed to uncover health hazards in school buildings.[10] An Administrative Law Judge found, in part, that the claim was not timely because it was filed beyond the 30-day filing period.[11] The Secretary, however, reversed that decision, reasoning that the time limitation should not be strictly enforced because the Act stated that a complaint "may" be filed within 30 days.[12] The Circuit Court of Appeals reversed the Secretary's determination, concluding that "the time limitation is not jurisdictional in the sense that noncompliance is an absolute bar to administrative action. Nevertheless, in these circumstances, the failure to file a complaint within the prescribed thirty days requires a decision in favor of the school district."[13]

With regard to Complainant's argument that a discrimination claim may be filed with any OSHA officer or employee, I note a similar argument in *Glasscock v. Alliant Foodservice, Inc*.[14] In that case, the complainant, a commercial truck driver, was terminated on September 30, 1998.[15] He filed his STAA complaint with Oregon OSHA on February 23, 1999.[16] The claim was ultimately filed with the U.S. Secretary of Labor on May 4, 1999; the Secretary dismissed the claim, finding that it was not timely filed.[17] The claimant argued before the Administrative Law Judge that his claim was timely, and should be considered filed with the Secretary of Labor because it was served on a local OSHA office.[18] The Judge concluded that the filing with the Oregon OSHA office did not constitute effective filing for the STAA, because the regulations require filing with a local office of federal OSHA, not with the state OSHA.[19] The Regulations do

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[9] 657 F.2d 16 (3d Cir. 1981).

[10] *Id.* at 17.

[11] *Id.*

[12] *Id.* at 17-18.

[13] *Id.* at 18.

[14] 1999-STA-44 (ALJ Jan. 13, 2000).

[15] *Id.* at 2.

[16] *Id.*

[17] *Id.* at 2-3.

[18] *Id.* at 3.

[19] *Id.*

not refer to a state OSHA, which is only authorized to address state law violations; rather, a federal OSHA office is the proper recipient of STAA claims.[20]

Based on the Court's decision in *School District of Allentown*, Claimant's argument that the word "may" does not require filing within 180 days after termination fails. The time limitation has been created "to allow the Secretary to decline to entertain complaints which have become stale. Accordingly, complaints not filed within 180 days of the alleged violation will ordinarily be considered to be untimely."[21] Likewise, under *Glasscock*, the Claimant's filing with Arizona OSHA is not a proper filing for a federal STAA claim. Therefore, I find the claim to be untimely.

Although I have concluded that the claim was not timely filed, the Regulations also provide for circumstances, which "justify tolling the 180-day period on the basis of recognized equitable principles or because of extenuating circumstances."[22] In *School District of Allentown*, the Third Circuit adopted the Second Circuit's interpretation of Supreme Court precedent, and found tolling to be appropriate only when: "(1) the defendant has actively misled the plaintiff respecting the cause of action, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum."[23] The Court added, however, that in order to toll the limitations, the claim filed in the wrong forum must have been filed timely.[24] The Regulations further note that the "pendency of grievance-arbitration proceedings or filing with another agency are examples of circumstances which do not justify a tolling of the 180-day period."[25]

Superficially, the present case is most akin to the background facts in *Glasscock*, where

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[20] *Id.* at 3-4.

[21] 29 C.F.R. § 1978.102(d)(2).

[22] 29 C.F.R. § 1978.102(d)(3).

[23] *School District of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981)(citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978)). *See also Reemsnyder v. Mayflower Transit, Inc*, 1993-STA-4, at 12 (ALJ Nov. 12, 1993)(citing *Ellis v. Ray A. Schoppert Trucking*, 1992-STA-28 (Sec'y Sept. 23, 1992)).

[24] *School District of Allentown*, 657 F.2d at 20 (citing *Burnett v. New York Central Railroad*, 380 U.S. 424 (1965)).

[25] 29 C.F.R. § 1978.102(d)(3).

the complainant filed a claim with Oregon's OSHA, rather than the federal OSHA.[26] In that case, the Court recognized the principle of equitable tolling. However, the Administrative Law Judge declined to apply the relief, noting "the doctrine of equitable tolling is generally inapplicable where a plaintiff is represented by counsel."[27] The Court found that the complainant had been represented by counsel throughout the case, and thus, "equitable tolling should not apply."[28]

In *Tierney v. Sun-Re Cheese, Inc.*, the complainant learned of his termination on May 16, 1997.[29] He filed a complaint with the Pennsylvania's Department of Labor and Industry, and state Human Rights Commission.[30] The complainant also contacted Legal Aid, who was too understaffed to help him; they suggested that he file a Workers' Compensation claim, which he successfully prosecuted.[31] After considering the facts, however, the Administrative Law Judge determined that the complainant's federal STAA claim was not timely filed and there were not sufficient grounds for tolling. In conclusion, he noted that the complainant filed state claims with multiple agencies and had received benefits; thus, the judge found that the complainant failed to establish "that he has in some extraordinary way been prevented from asserting his rights."[32]

On appeal, the Administrative Review Board ("the Board" or "ARB") noted the three bases for equitable tolling, as set forth in *School District of Allentown*, but found that none of the three situations arose in the case. In particular, the Board stated that "there is nothing in Tierney's pleadings or testimony to demonstrate that before these agencies he 'raised the precise statutory claim in issue,' *i.e.*, a complaint that he was discharged in retaliation for activity protected by the STAA whistle blower provision."[33]

In the present case, the Complainant filed his complaint with Arizona's state OSHA office.

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[26] *Glasscock v. Alliant Foodservice, Inc.*, 1999-STA-44 (ALJ Jan. 13, 2000).

[27] *Id.* at 4 (citing *Kent v. Barton Protective Services*, 1984-WPC-2, slip op. at 11-12 (Sec'y, Sept. 28, 1990), (*aff'd, Kent v. U.S. Department of Labor* (11th Cir. 1991))).

[28] *Glasscock*, at 4.

[29] *Tierney v. Sun-Re Cheese, Inc.*, 2000-STA-12, at 3 (ALJ Apr. 27, 2000).

[30] *Id.* at 7-8.

[31] *Id.* at 8.

[32] *Id.* at 9 (citing *School District of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981)).

[33] *Tierney v. Sun-Re Cheese, Inc.*, 2000-STA-12 (ARB Mar. 22, 2001).

However, unlike the complainant in *Glasscock*, Mr. Hillis was not represented by an attorney throughout this process. On the contrary, Mrs. Hillis testified that after contacting EEOC, she received a list of 48 labor attorneys. (TR 146). She further testified that she looked for attorneys in the telephone book. (TR 146-147). She contacted some of those attorneys, the 48 on the EEOC's list, and "they all wanted money up front." (TR 147). One of them suggested she contact the U.S. Department of Labor, OSHA, and Senator McCain, but this attorney, too, requested up-front payment. (TR 147). The Claimant's counsel noted that she did not meet with the Complainant until after the 180 days had passed. (TR 14).

Mrs. Hillis testified that she, like the complainant in *Tierney*, contacted numerous state agencies. Unlike Mr. Tierney, however, the Complainant here did not attain benefits from his state claims. While he received unemployment compensation, Mrs. Hillis testified that the other state agencies informed her that these matters were not in their respective jurisdictions. (TR 141-142). Moreover, the Board, in *Tierney*, found that the complainant had not raised the precise statutory claim in issue with the state boards. In the instant matter, Mrs. Hillis testified that on October 5, 2001, she contacted Arizona's OSHA be telephone and explained the circumstances and reasons for her call. (TR 141).

Based on the unique advantage of having heard the testimony firsthand, I observed the behavior and demeanor of the witnesses. To the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses. After reviewing the criteria for credibility, and listening to Mrs. Hillis' testimony at length, I find Mrs. Hillis to be a highly credible witness and her testimony compelling. Moreover, Mrs. Hillis' testimony is supported by the evidence in the record. Based on her testimony, I find that Mrs. Hillis filed a complaint by telephone with Arizona's OSHA on October 5, 2001. There is no requirement that a complaint take any form, thus, the telephonic complaint is sufficient.[34] I further find that Mrs. Hillis, on her husband's behalf, raised the precise statutory claim at issue here with Arizona's OSHA. She moved through this process without the assistance of counsel, persistently pursuing the relief allowed by the Act. The Complainant filed his statutory claim in the wrong forum. Such filing, however, is one of the situations enunciated in case law as a justification for applying equitable relief in the form of tolling.

Therefore, I find that the Complainant has established grounds for equitable tolling. Accordingly, having found tolling of the 180-day statutory period to be appropriate, I will now review the merits of the case.

Protected Activity

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[34] *See, e.g., Reemsnyder v. Mayflower Transit, Inc.*, 1993-STA-4, at 12 (ALJ Nov. 12, 1993).

An employee may not be discharged, disciplined or discriminated against if he refuses to operate a vehicle because operation would violate a regulation or standard, or if he has a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition.[35] The unsafe conditions causing the employee's apprehension "must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition."[36] Moreover, to be eligible for protection, "the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition."[37]

The Complainant testified that, according to his understanding of the law, it was illegal to operate the commercial truck without a mud flap, or without mud flap of proper size. (TR 20). Mr. Hillis said that he refused to install the two offered mud flaps because he was concerned about public safety, as well as receiving a traffic citation. (TR 21, 28). Mr. Hillis believed that both of the mud flaps presented to him were illegal. (TR 38). On redirect examination, Mr. Hillis again stated that he had a reasonable apprehension that both mud flaps were unsafe and illegal. (TR 94).

Mr. Hillis further said that he told Mr. Purdom that those mud flaps were illegal, and he refused to install them. (TR 24-25). When asked if Mr. Hillis ever used the word "illegal", Mr. Purdom responded, "Not that I recall." (TR 204; *See also* TR 217). However, Mr. Purdom later altered his testimony, claiming, "He didn't say nothing about public safety or legalities or nothing." (TR 225).

On cross-examination, Mr. Hillis was taken aback by counsel's suggestion that mud flaps were not necessary on a tractor when a trailer is attached. (TR 46-47). Moreover, on recross-examination, Mr. Hillis read part of the Arizona statute regarding mud flaps. (TR 117-118). He acknowledged that under the statute, a mud flap was not required on his tractor if used in combination with another vehicle, such as the low-boy trailer. (TR 118-119).

Mr. Hillis testified that he informed his supervisor that driving without a mud flap, or using the mud flaps offered to him, would be illegal. Twice asked, Mr. Purdom was not able to remember the details of the conversation, however, he then changed his testimony and claimed that no mention of illegality was made.

Based on the unique advantage of having heard the testimony firsthand, I observed the behavior and demeanor of the witnesses. Again, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire

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[35] 49 U.S.C. § 31105(a).

[36] *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1062-1063 (5th Cir. 1991).

[37] 49 U.S.C. § 31105(a)(2).

testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses. After reviewing the criteria for credibility, and listening to the witnesses' testimony at length, I find Mr. Hillis to be a more credible witness and his testimony compelling. Moreover, Mr. Hillis' testimony is supported by the evidence in the record. Accordingly, I find that Mr. Hillis informed the Respondent that he believed the actions they were asking him to take were illegal.

Furthermore, under the Arizona regulations, mud flaps were not required if the Complainant was not going to drop his trailer, thus the Complainant was wrong with his initial interpretation of the law, as he stated it on October 3, 2001. However, when examined by Respondent's counsel about this fact, Mr. Hillis was visibly surprised by the actual text of the law. Furthermore, Mr. Hillis testified that he had a reasonable apprehension that the mud flaps offered by the Respondent were illegal and unsafe; accordingly, he refused to drive the truck without a mud flap, or with either of the mud flaps offered. He further stated that he was concerned about both public safety and the potential for a traffic citation. I find that the Complainant had an apprehension of risk to public safety and illegality when he refused the mud flaps offered to him.

After considering the evidence, particularly Mr. Purdom's testimony regarding the purpose of mud flaps, and the potential, albeit limited, for the Complainant to be asked to drop a trailer, I find that a reasonable person under the circumstances would conclude that there was bona fide risk of danger from the unsafe condition. Moreover, Mr. Hillis sought relief from the employer, but was not able to obtain a satisfactory correction of the perceived unsafe condition. Accordingly, I find the Complainant's apprehension to be reasonable, and thus sufficient to satisfy the statute.

I find that the Complainant refused to drive the commercial vehicle because he had a reasonable apprehension that the vehicle's unsafe condition could result in injury to the public. Therefore, I find that the Complainant has established that he engaged in protected activity.

Adverse Action

The Complainant must prove that the Respondent took some adverse action against him. On October 3, 2001, the Complainant's employment was terminated by Mr. Purdom, the Respondent's Maintenance Supervisor/Transportation Coordinator/Shop Manager. Mr. Hillis testified that he applied for unemployment the day after he was fired. (TR 41). Shortly after that, he submitted a statement to the unemployment agency regarding the reasons for his termination. (*Id.*) His claims were not refuted, and thus he received unemployment compensation benefits.

Mr. Holverson also testified regarding the Complainant's termination. According to him, Mr. Purdom told the Complainant to "clock out" if he was not going to follow the instructions. (TR 274). However, despite sitting near the time clock, Mr. Holverson did not know who ultimately punched the Complainant's timecard. (TR 274). Mr. Hillis, however, testified that he was told, "clean out your truck, I was done." (TR 26). Similarly, through his testimony, Mr.

Purdom explained the circumstances in terms of a firing. (TR 203-204). More directly, Complainant's counsel asked him, "But he didn't quit, he was fired, correct?" (TR 194). Mr. Purdom responded, "Right." (*Id.*)

Considering all of the evidence, I find that the Complainant was fired by the Respondent. Accordingly, I find the Respondent has taken adverse action against the Complainant.

Respondent's Knowledge of Protected Activity

A complainant must next demonstrate that the respondent knew of his protected activity when it took the adverse action. In the present case, I previously found that the Complainant told the Respondent that he believed it was illegal and unsafe to drive the truck without a mud flap, or with the mud flaps offered to him by the Respondent.

Mr. Purdom stated that he understood the law regarding mud flaps to mean that a mud flap was not required on the tractor when it was coupled with a trailer. (TR 196). Mr. Purdom further noted that, in their practice, a mud flap is required only when moving and dropping a water tower because every other load requires an attached trailer. (TR 208). Mr. Purdom did not foresee the Complainant running without a trailer on October 3, 2001 (*Id.*), however, he admitted that, in general, there were times when the Complainant used a trailer, and times when he needed to drop the trailer. (TR 217).

According to Mr. Holverson, Mr. Hillis did not want to put a black mud flap onto his truck, but the witness did not hear any mention of public safety or legality. (TR 271). Mr. Holverson stated that he did not hear much discussion about two sizes of flaps, and he admitted that he does not know if he heard every word of the conversation. (TR 269-270). Despite not hearing the entire conversation, Mr. Holverson concluded that he just knew "he didn't want to put one of those black flaps on." (TR 270).

Mr. Knochel testified that he was not present during the incident between Mr. Hillis and Mr. Purdom on October 3, 2001. (TR 231). He learned of the firing, and Mr. Purdom's reason for the action, on October 3, 2001, as Mr. Hillis was leaving. (TR 234). Mr. Knochel stated that he was not told about any charges of illegality on or about October 3, 2001. (TR 249). Likewise, he was not informed of any complaints about his trucks being unsafe, or a risk to public safety. (*Id.*) He noted, however, that he understands the law, which specifically exempts the mud flap requirement on tractors, if there is a trailer attached. (TR 240). When a trailer is attached, the mud flaps could be removed from the tractor. (TR 241). Finally, he confirmed that Mr. Purdom had authority to fire an employee. (TR 248).

Mr. Holverson and Mr. Knochel both testified that they were not aware of the entire exchange between Mr. Hillis and Mr. Purdom. Mr. Holverson has some difficulty hearing. He noted that he did not hear every word, and Mr. Hillis and Mr. Purdom eventually moved their conversation outside the trailer, during which he could not see or hear the discussion. Therefore,

I give less weight to Mr. Holverson's testimony regarding the Respondent's knowledge. Moreover, Mr. Holverson was not part of the decision to terminate the Complainant, therefore, his knowledge is not sufficient to be imputed to the Respondent.

Similarly, Mr. Knochel was not present during the conversation. He arrived as Mr. Hillis was leaving the property. While he was not advised about any complaints of illegality or risks to public safety, his knowledge was not firsthand. Therefore, I give less weight to Mr. Knochel's testimony regarding the Respondent's knowledge. Furthermore, Mr. Knochel has empowered Mr. Purdom to fire employees. Due to his absence, Mr. Knochel was not part of the decision to terminate the Complainant. Thus, his knowledge of whether mud flaps were required at the time is not relevant.

For the foregoing reasons, Mr. Purdom is the only person whose knowledge is relevant to this element. Mr. Purdom testified that he knew the law regarding mud flaps. However, at no point does he state that he explained the law to Mr. Hillis. Similarly, the record is void of any attempt by Mr. Purdom to allay the Complainant's apprehensions about driving with an illegal condition, or creating a risk to public safety. Moreover, Mr. Purdom acknowledged that when he pressed Mr. Hillis to install one of these mud flaps, the Complainant's mannerisms evidenced that he was uncomfortable doing what Mr. Purdom was asking him to do. (TR 193). As previously noted, I found that Mr. Hillis told Mr. Purdom that he believed driving the truck under the Mr. Purdom's mandated conditions was illegal and unsafe for the public; for those reasons he refused to drive the truck. When the two could not agree, Mr. Purdom fired the Complainant, as he was empowered to do by Mr. Knochel.

Therefore, I find that the Respondent had knowledge of the Complainant's protected activity when it took the adverse action against him.

Nexus Between Protected Activity and Adverse Action

The final element that a complainant must establish is a causal connection between his protected activity and the respondent's adverse action. The Complainant testified that he was given an ultimatum to use one of the two mud flaps offered to him by Mr. Purdom, or be fired. (TR 24). He also noted that immediately after he refused those mud flaps, he was told to clean out his truck and leave. (TR 26). Mr. Hillis opined that he was fired as a direct result of his refusal to install the Respondent's mud flaps. (TR 25, 26). Mr. Purdom was asked if the Complainant's firing was directly linked to the mud flap incident, to which he replied, "I think this was the straw that broke the camel's back." (TR 194).

Based on the evidence, especially the testimony of Mr. Hillis and Mr. Purdom, and the close proximity in time between the protected activity and the firing, I find that the Complainant has established a causal connection between his protected activity and the Respondent's adverse action.

Legitimate, Nondiscriminatory Reason

Once the complainant has established a *prima facie* case, the burden of production shifts to the respondent to demonstrate a legitimate, nondiscriminatory reason for its employment action.[38] To satisfy the burden of production, the respondent need only articulate a legitimate reason for the adverse action, and no credibility assessment is appropriate at that time.[39]

As noted above, Mr. Purdom, acknowledging that the Complainant was ultimately fired for his refusal to drive with the mud flaps offered to him, said, "I think this was the straw that broke the camel's back." (TR 194). Furthermore, he noted in a "To Whom It May Concern" letter that he fired Mr. Hillis after the mud flap dispute, and "[g]iven his past poor job performance." (CX 3). According to Mr. Purdom, then, there were additional factors contributing to the decision to terminate the Complainant's employment. Mr. Purdom testified that those reasons included the Complainant's pace, his penchant for talking, and his two previous accidents.

Mr. Purdom, noting that he had previously done the Complainant's job, discussed his belief that the Complainant took too long to make his deliveries. (TR 205). Moreover, he claimed that Mr. Hillis had a reputation as a talker. He stated, "Cliff would just stand out there and talk forever. He'll find anybody to talk to and just stand there and talk instead of getting on with his job." (*Id.*) Mr. Purdom also stated that he thought Mr. Hillis wanted his job (TR 186), but he added, "I saw a laxity he came at. I wasn't sure if he wanted it or not." (TR 187). In addition to the Complainant's slow pace, frequent talks with coworkers, and perceived lax attitude, Mr. Purdom noted that the Complainant was involved in two accidents, causing damage to the company's water truck, and hitting an overpass with a load he was hauling. (TR 209).

Mr. Knochel similarly testified about the Complainant's previous accidents. First, he discussed the situation when Mr. Hillis drove under an overpass that was too low, which caused his shipment to collide with the overpass. (TR 250). Between repair costs and rental expenses for replacement equipment, Mr. Knochel estimated his costs were approximately $59,000. (*Id.*) He determined that the accident was the result of the Complainant's negligence. (TR 250-251). Additionally, Mr. Knochel discussed the Complainant's second accident, when he failed to put the ramps down before off-loading the water truck from the low-boy trailer. (TR 251). Mr. Knochel opined that the only imaginable reason for the accident was the Complainant's negligence. (*Id.*)

Moreover, Mr. Knochel observed that Mr. Hillis walked at a slow pace, and he occasionally talked too much with other employees. (TR 247-248, 252). After he told the Complainant that a second truck would be added to share the workload, and there would be less

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[38] *Moon v. Transport Drivers, Inc.*, 836 F.3d 226, 229 (6th Cir. 1987).

[39] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993).

overtime, Mr. Knochel said that the Complainant's attitude toward the company changed. For instance, Mr. Knochel noted that Mr. Hillis no longer waived to him when they saw each other at work. (TR 246-247).

The examples discussed by Mr. Knochel and Mr. Purdom appear to be the additional occurrences that Mr. Purdom impliedly relied on when he referred to the mud flap incident as "the straw that broke the camel's back." The Respondents, thus, have satisfied their burden of production by providing legitimate, nondiscriminatory grounds for terminating the Complainant's employment.

Pretext for Discrimination

If the respondent successfully rebuts the complainant's *prima facie* case, the burden of persuasion falls to the complainant, who must prove, by a preponderance of the evidence, that the reasons proffered by the respondent were not its true reasons, but rather, a pretext for discrimination.[40]

The most costly, and thus most logical, explanation for the Complainant's termination is the Respondent's discussion about the two accidents caused by the Complainant's negligence. Mr. Purdom discussed the accidents generally in his testimony. Mr. Knochel also discussed the accidents, as well as provided information about the approximate financial costs of the incidents to his company. As was noted, the Complainant was never fired or punished for these accidents. (TR 189-190, 209).

After his two accidents, not only was the Complainant not fired, he was not given a performance review. For instance, despite the amount of damage Mr. Hillis caused, Mr. Knochel stated that he never ordered a performance review. (TR 235). Mr. Hillis testified that he was not at work on October 3, 2001, for a performance review. (TR 33). Similarly, he testified that he has never had a personnel review. (TR 34). He added, "There was nobody unhappy with my job performance to my knowledge." (*Id.*) He stated that when he was told he was fired, there was no mention of past performance in general or his accidents in particular. (TR 33, 88).

Perhaps most indicative of the legitimacy of this reason for termination is Mr. Knochel's testimony. During his testimony, he described his management style and his general nature as an employer. He noted both circumstances where he has fired people, as well as instances of employees with many years of service. Although the accidents discussed resulted from the Complainant's negligence, Mr. Knochel appeared to understand that such incidents occur. He testified that Mr. Hillis was not fired for the accidents, because the Complainant knew he made a mistake; Mr. Knochel believes that once an employee learned the lesson, he would not make the

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[40] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-47 (2000); *St. Mary's Honor Center*, 509 U.S. at 506-510.

mistake again. Learning that lesson was more valuable than hiring and training a new person. (TR 251). This testimony illustrates why Mr. Knochel did not fire Mr. Hillis for his previous two accidents. Mr. Knochel further observed, "Acts of negligence are one thing. Petulance is another. Insubordination, direct defiance of an order, that goes along a little different line than 'I wasn't paying attention.'" (TR 253). From his testimony, Mr. Knochel apparently believes negligence that results in accidents should be treated differently from insubordination.

In the past, Mr. Hillis was involved in two accidents, which resulted in significant costs to the Respondent, but he was not fired. Presently, Mr. Hillis directly defied Mr. Purdom's order to install one of the two mud flaps provided by the Respondent. According to Mr. Knochel's testimony, negligence was a forgivable offense, however, the Complainant's direct defiance of an order requires variant punishment. Based on the evidence, I find that the previous accidents did not play a role in the Complainant's termination.

Mr. Purdom stated that he thought the Complainant wanted his job, but certain actions made him unsure. Mr. Purdom and Mr. Knochel both discussed the Complainant's unrest regarding the addition of a second truck and hiring of another driver. They both noted that the Complainant feared his overtime hours would cease and his attitude towards the company worsened. Mr. Hillis, however, testified that he liked his job and did not want to leave the Respondent. (TR 35, 28). Moreover, the Complainant testified that there was more than enough work for both drivers, and he continued to work over 40 hours per week.

Mr. Purdom and Mr. Knochel both noted the Complainant's slow gait and frequent discussions with coworkers. Mr. Hillis likewise acknowledged that he talked to everyone at work. As noted above, however, he was never given a performance review, and the record fails to show that anyone ever complained about his habits or work ethic. Rather, when asked if he was good at his job, the Complainant responded, "Well everybody at the company at the time seemed to think I was. And yeah, I think I am." (TR 18).

Based on the evidence, the Complainant has demonstrated that his termination was not due to his work habits or any poor attitude towards the company.

Finally, prior to the letter signed by Mr. Purdom, dated September 23, 2002, (CX 3) the record is silent as to any indication that Mr. Hillis was fired for any reason other than the confrontation over the mud flap. The Complainant filed for unemployment compensation on October 5, 2001, and submitted a statement explaining the situation within ten days of his termination. (CX 1). That statement, which was never contested by the Respondent, directly links his termination to the mud flap dispute. (TR 42, 68-69). As previously discussed, Mr. Purdom's testimony links the termination to his dispute with the Complainant. Moreover, Mr. Knochel testified that when he arrived and inquired about Mr. Hillis, it was brought to his attention that Mr. Hillis was fired over the mud flap altercation. (TR 235). Finally, the proximity of time is relevant. The Complainant and Mr. Purdom had an exchange about the mud flap, which elevated to an argument, and concluded with Mr. Purdom telling the Complainant he was fired.

Mr. Purdom stated that he tried to preserve the Complainant's job (TR 210) by following Mr. Hillis to the truck and trying to make amends. The Complainant rebuffed this attempt, however, because he maintained his apprehension about the legality and safety of the approach recommended by Mr. Purdom.

Mr. Hillis had much more to lose than did the Respondent. While Mr. Knochel noted that he prefers to keep employees, even after acts of negligence, over hiring and training someone new, finding a new transport driver would be less burdensome on the Respondent than the Complainant leaving a job he liked, and for which he was well compensated. The Complainant risked leaving a situation he enjoyed; more importantly he risked financial instability, which he ultimately realized, resulting in his filing for bankruptcy. Mr. Hillis explained his apprehension, which I found reasonable, regarding the legality and safety of the mud flaps offered to him. His apprehensions outweighed his desire to maintain employment arrangement, and he was fired as a result.

The Respondent has offered legitimate, nondiscriminatory reasons for not keeping the Complainant in its employ. However, the Complainant has successfully demonstrated that the reasons offered by the Respondent are not their true reasons, but rather, a pretext for discrimination.

DAMAGES

Once a complainant has successfully met his burden, he is entitled to damages. Mr. and Mrs. Hillis both testified with regards to the damages they have suffered. Mr. Hillis stated that he was out of work for over six months. (TR 26). As a result of his termination, he claimed that the couple's savings and individual retirement accounts ("IRAs") have been depleted. (TR 26-27). The couple became delinquent on their bills and their mortgage. (TR 27). Their house was set for foreclosure and their credit rating dropped. (*Id.*) Ultimately, the couple declared Chapter 13 bankruptcy on December 2, 2002. (*Id.*; TR 132). Mr. Hillis testified that he earned $16.50 an hour during his employment with the Respondent, and time-and-a-half for overtime, which averaged about 25 to 30 hours per week. (TR 27, 107-109). He has secured employment, as of April 15, 2002, earning $16.00 per hour, with virtually no opportunity for overtime. (TR 27-28, 109-110).

Mrs. Hillis stated that the Complainant lost over $34,000 in wages from the time he was terminated until his new employment began. (TR 157). They lost over $4,000 in savings. Mr. Hillis had an IRA through Knochel Brothers, which was broken down into three accounts, totaling approximately $14,000 or $15,000. (*Id.*) Mrs. Hillis also had an IRA from previous employment, worth approximately $17,000. (*Id.*) The savings account and IRAs were depleted as a result of the Complainant's termination. (*Id.*) Mrs. Hillis said that she and her husband have suffered extensive mental anguish from the stress of the situation, compounded by calls from bill collectors, a reduction in their credit score, and concerns about paying for necessities, like the mortgage, utilities, food, medication, and automobile fuel. (TR 158-159). Furthermore, they lost medical and dental benefits and had to pay those expenses out-of-pocket. (TR 159).

Mrs. Hillis stated that they are asking this Court for back pay, front pay and attorney's fees. (TR 157-159). In addition, they are seeking punitive damages for a just and fair amount. (TR 160-161). Mrs. Hillis also noted that the Complainant would be amenable to reinstatement under certain conditions, which were not enumerated during the hearing. (TR 157). Mr. Knochel, on the Respondent's behalf, however, testified that it "would be difficult" to rehire the Complainant, without elaborating. (TR 234-235).

The Complainant has established his burden, demonstrating that he was discriminated against. Thus, he is entitled to damages under the Act.

Reinstatement or Front Pay

The Complainant's wife stated that her husband would be open to the possibility of returning to Mr. Knochel's employ, under certain conditions. However, in light of Mr. Knochel's statements, I am concerned that, by his return, the Complainant may be subjected to a hostile work environment. Therefore, the Respondent is ordered to make a bona fide, unconditional offer of employment to the Complainant for his former position, or a substantially comparable position, at his former wage, within 30 days of this Order. Mr. Hillis shall then have the option to accept that offer within a reasonable time. If the Respondent does not have an available position or cannot make a bona fide, unconditional offer, or the Complainant rejects the offer, then the Respondent shall pay the Complainant front pay, as calculated below, for a period of two years from the date of this Order.

Back Pay and Front Pay

The Complainant first asked for back pay. The Complainant additionally asked for front pay. The Complainant testified that he earned $16.50 per hour, and averaged 25 to 30 hours of overtime at the rate of time-and-a-half of his usual pay. The Complainant stated that 67.5 hours per week was an accurate approximation of his average work week. (TR 108). The Respondent acquiesced to the $16.50 hourly rate, and did not object to amount of overtime. The Complainant said that he was unemployed until he began his current position, on or around April 15, 2002.

Once it is determined that an employer has violated the STAA, an award of back pay is mandated.[41] The method of calculating back pay has been approved by the Board in *Ass't. Sec'y*

[41] *Moravec v. HC & M Transportation, Inc.*, 1990-STA-44 (Sec'y Jan. 6, 1992)(citations omitted).

& Cotes v. Double R. Trucking, Inc.[42] According to that formula, I note that the Complainant earned $16.50 per hour straight time, or approximately $660.00 per week. In addition, I find that the Complainant worked approximately 27.5 hours overtime per week at $24.75 per hour, earning approximately $680.62 in weekly overtime wages. The Complainant's average total weekly wage was approximately $1,340.62.

The Complainant began working again on April 15, 2002, with weekly earnings of $16.00 per hour, and approximately 2 hours of overtime at $24.00 per hour. Since April 15, 2002, then, his average total weekly earnings is approximately $688.00.

For the period of October 3, 2001, to April 15, 2002, the Respondent must pay to the Complainant $1,340.62 for each of the 27 weeks, a total of $36,196.74.

Since April 15, 2002, the Respondent is responsible for the difference between the Complainant's present salary, and his earnings if he was still employed with the Respondent. The Complainant made $1,340.62 per week while employed with the Respondent, and earns $688.00 per week with his present employer. Thus, the Respondent must pay the difference of $652.62 per week. The total payment amount shall be calculated from April 15, 2002, until September 3, 2002, the date this claim was filed, which is 20 weeks and two days. Therefore, the Respondent must pay to the Complainant $13,052.40 for the 20 weeks and $261.04 for September 2 and 3, 2002, which totals $13,313.44.

Thus, the total back pay award totals $49,510.18.

As noted above, if the Respondent makes a bona fide, unconditional offer of reinstatement to the Complainant within 30 days of this Order, and Mr. Hillis accepts that offer within a reasonable time, the Respondent does not have to compensate him for front pay. However, if the Respondent does not have an available position or cannot make a bona fide, unconditional offer, or the Complainant rejects the offer, then the Respondent shall pay the Complainant front pay of $652.62 per week, for two years, commencing with the date of this Order, or a total of $67,872.48.

Interest

The Complainant is entitled to interest on the back pay award. Pre-judgment interest is owed to the Complainant from October 3, 2001, the time of termination, until this Court's order for reinstatement.[43] Post-judgment interest is to be paid from the date of this Order, until the date

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[42] *Ass't. Sec'y & Cotes v. Double R. Trucking, Inc.*, 1998-STA-34 (ARB Jan. 12, 2000).

[43] *Johnson v. Roadway Express, Inc.*, 1999-STA-5 (ARB Mar. 29, 2000).

of payment for back wages is made.[44] The interest is to be compounded quarterly and the rate to be applied is set out in 26 U.S.C. § 6621.[45]

Pension and Health Benefits

There was discussion about the Complainant's premature withdrawal of IRA proceeds. Typically, such action results in penalties to the withdrawing party. The Complainant would thus be entitled to collect the amount in penalties paid for the early withdrawal on IRAs held by either the Complainant or Mrs. Hillis. The Complainant is also awarded payment for any employer contributions that would have been made if Mr. Hillis was not terminated. The amount of pension contributions owed to the Complainant is from October 3, 2001, until the Respondent makes a bona fide, unconditional offer of reinstatement to the Complainant and Mr. Hillis accepts that offer, or the date in which the Respondent pays the total award amount ordered herein to the Complainant, whichever occurs first. If the Respondent does not have an available position or cannot make a bona fide, unconditional offer, or the Complainant rejects the offer, then the Respondent shall pay the Complainant its share of the IRA contribution from October 3, 2001, until the award granted herein is paid in full.

Mrs. Hillis testified that she and her husband lost medical and dental benefits, which resulted in out-of-pocket expenses exceeding $1,000. (TR 159). The Complainant is entitled to recover expenses paid for health care that would have been covered under the Respondent's plan. Reimbursements for health care expenses should be paid directly to the Complainant if the charges have already been paid, or to the health care provider if not yet paid.[46] The Complainant, however, has not submitted proof of medical expenses. The Complainant must submit to the Respondent, within 30 days of this Order, proof of medical expenses incurred by him and his wife during the time the Complainant was without health coverage. The Respondent must pay those costs within 30 days of receipt of proof.

Pain and Suffering

The whistle blower statutes permit compensatory damages.[47] The purpose of awarding compensatory damages is to make the complainant whole. They are designed to compensate for direct pecuniary loss, as well as impairment of reputation, personal humiliation, mental anguish

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[44] *Id.*

[45] *Murray v. Air Ride, Inc.*, 1999-STA-34 (ARB Dec. 29, 2000)(citing *Johnson*, 1999-STA-5, at 17-18; 29 C.F.R. § 20.58(a)(1999)).

[46] *Dutile v. Tighe Trucking, Inc.*, 1993-STA-31 (Sec'y June 3, 1994).

[47] *See, e.g., Nolan v. AC Express,* 1992-STA-37 (Sec'y Jan.17, 1995).

and suffering, and other like harms.[48] In order to recover compensatory damages, a whistle blower complainant must demonstrate emotional distress was caused by the respondent's adverse actions.[49] However, it is not necessary to provide expert testimony to establish the existence of mental distress resulting from an employer's hostile working environment.[50]

Mrs. Hillis asserted that she and her husband have suffered extensive mental anguish. She described how stressful it was receiving calls from bill collection agencies, not being able to pay bills, not knowing "where our next meal was coming from or our next paycheck." (TR 158-159). The couple used money from their retirement plans and savings account to meet everyday living expenses. Mr. Hillis was unemployed for more than six months, eventually accepting a position earning less money. Ultimately the couple filed for bankruptcy. Although no official medical records or expert testimony was presented, I find that Mr. and Mrs. Hillis experienced mental anguish and emotional distress as a result of the Respondent's actions. Based on the foregoing, I find that the Complainant is entitled to compensatory damages.

The common meaning of "compensatory" includes back wages, as well as damages for pain and suffering.[51] The Secretary and the Administrative Review Board "have long held that compensatory damage awards for emotional distress or mental anguish should be similar to awards made in other cases involving comparable degrees of injury."[52] A vast array of award amounts have been upheld.[53] For example, in *DeFord v. Tennessee Valley Authority*, the claimant received $10,000 in damages for chest pains, difficulty with swallowing, indigestion, sleeplessness, and general anxiety and depression.[54] In *Aumiller v. University of Delaware*, the claimant likewise received $10,000 for anxiety neurosis, insomnia, nightmares, fatigue and severe financial difficulties.[55] An award of $20,000 was upheld as a "modest award under the

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[48] *Leveille v. New York Air Nat'l Guard*, 1994-TSC-3 & 4 (ARB Oct. 25, 1999).

[49] *Doyle v. Hydro Nuclear Services*, 1989-ERA-22 (ARB Sept. 6, 1996).

[50] *Smith v. Esicorp, Inc.*, 1993-ERA-16 (ALJ Feb. 26, 1997)(citing *Busche v. Burkee*, 649 F.2d 509, 519 (7th Cir. 1981)).

[51] *Michaud v. BSP Transport, Inc.*, 1995-STA-29 (ARB Oct. 9, 1997).

[52] *Leveille v. New York Air National Guard*, 1994-TSC-3 & 4 (ARB Oct. 25, 1999).

[53] *See, e.g., McCuistion v. Tennessee Valley Authority*, 1989-ERA-6 (Sec'y Nov. 13, 1991).

[54] *DeFord v. Tennessee Valley Authority*, 1981-ERA-1 (Sec'y Apr. 30, 1984).

[55] *Aumiller v. University of Delaware*, 434 F. Supp. 1273, 1309-1311 (D. Del. 1977).

circumstances," in *Murray v. Air Ride*.[56] The Board noted the complainant's testimony that he was forced to file for bankruptcy, he developed a hernia, which was untreated and worsened, he had difficulty sleeping, and his self-esteem had been damaged.[57] However, in *Muldrew v. Anheuser-Busch, Inc.*, the Court of Appeals held an award of $50,000 was reasonable for emotional distress and mental suffering for the complainant's loss of his house and his car, and marital difficulties that resulted.[58] Likewise, in *Wulf v. City of Wichita*, the court granted an award of not greater than $50,000 to a plaintiff who was angry, scared, frustrated, depressed, under emotional strain, and experienced financial difficulties as a result of losing his job.[59]

I have already discussed above the damage award for lost wages and benefits, such as IRAs and health care expenses. With regard to the Complainant's pain and suffering, I find that Mr. and Mrs. Hillis were placed in a highly stressful position as a result of the Complainant's termination. They suffered mental anguish and were forced into bankruptcy from the impact of the Respondent's employment action.[60] Accordingly, the Complainant is awarded $20,000 in damages for pain and suffering.

Punitive damages

Mrs. Hillis testified that the Complainant is seeking punitive damages. Punitive damages are not authorized under the STAA.[61] Therefore, the Complainant's request for punitive damages is denied.

Attorney's Fees

The Complainant also requested attorney's fees. Mrs. Hillis stated that counsel normally charges $200 per hour, and projected the number of hours required thus far. (TR 160). The Complainant's counsel is entitled to her fees and costs, as a result of her successful prosecution of the case. No statement by counsel regarding fees or costs has been received by this Court. Counsel for the Complainant must submit a petition to this Court in order to recover attorney's fees.

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[56] *Murray v. Air Ride, Inc.*, 1999-STA-34 (ARB Dec. 29, 2000).

[57] *Id.* at 7.

[58] *Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989, 992 and n.1 (8th Cir. 1984).

[59] *Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989).

[60] *See, e.g., Murray v. Air Ride, Inc.*, 1999-STA-34 (ARB Dec. 29, 2000).

[61] 49 U.S.C. §§ 31105(b)(3)(A) and (B); *Nolan v. AC Express*, 1992-STA-37 (Sec'y Jan. 17, 1995).

Posting

Posting a notice to notify the Respondent's employees of the outcome of the case is a standard remedy in discrimination cases.[62] Therefore, the Respondent shall post a written notice advising its employees that the disciplinary action against the Complainant has been expunged and that the Complainant prevailed in his complaint.

CONCLUSION

The Complainant's claim for benefits was not timely filed, however, I find sufficient grounds to apply the principle of equitable tolling. The Complainant engaged in protected activity when he refused to drive the Respondent's truck based on his reasonable apprehensions that doing so would be illegal and unsafe to the public. The Respondent took adverse action against the Complainant when Mr. Purdom fired him. I find that the Complainant conveyed his concerns about the legality and risks to public safety when given his orders to drive the truck, and he was subsequently fired. Therefore, the Respondent knew of the Complainant's protected activity when it took the adverse action. Finally, the Complainant established a causal connection between his protected activity and the Respondent's adverse action. The Respondents established legitimate, non-discriminatory reasons for the adverse action. The Complainant, however, successfully established that those reasons were not the real reasons for the adverse action, but rather a pretext for discrimination.

Accordingly, the Claimant is entitled to recover damages under the Act, as described above in the "Damages" section of this Order. The Respondent must pay the Complainant back pay totaling $49,510.18. Back pay amounts are subject to interest. Likewise, the Respondent is liable for front pay damages. If the Respondent does not give the Complainant a bona fide, unconditional offer of employment for his former position, or a substantially comparable position, at his former wage, or the Complainant rejects the Respondent's offer for reinstatement, then the Respondent must pay front pay damages in the amount of $67,872.48.

The Complainant is also awarded fees and penalties associated with the withdrawal of his and Mrs. Hillis' IRA proceeds, and IRA contributions that the Respondent would have made had the Complainant not been fired. Thus, in addition to the fees and penalties for withdrawal of the IRA proceeds, the Respondent must pay the Complainant the IRA contributions since October 3, 2001, until the Complainant accepts the qualifying offer for reinstatement, or the award granted herein is paid in full, whichever occurs first. The Complainant is entitled to recover medical costs (after proper documentation is provided). Finally, the Complainant is awarded $20,000 in compensatory damages for pain and suffering. The Complainant is not entitled to punitive damages under the Act. However, the Respondent must pay fees for the Complainant's attorney after a proper fee petition is filed with this Court, and corresponding Order is issued. Moreover, the Respondent must post a notice informing its employees that this action has been decided in the

[62] *Michaud v. BSP Transport, Inc.*, 1995-STA-29 (ARB Oct. 9, 1997).

Complainant's favor.

ORDER

In view of the foregoing, and based upon the entire record, I hereby recommend that the claim filed under Section 31105 of the Surface Transportation Assistance Act by the Complainant, Clifford E. Hillis, be GRANTED. I further recommend that damages be awarded as set forth above.

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ROBERT J. LESNICK
Administrative Law Judge

RJL/SR/dmr

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten (10) business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).